No. 15248

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of conviction in the United States District Court for the Southern District of California, Central Division. The jurisdiction of the District Court arose under Title 18, United States Code, Section 1343 (Fraud by Wire, Radio or Television), July 16, 1952, Chapter 879, Section 18(a), 66 Stats. 722; and Title 18, United States Code, Section 3231, June 25, 1948, Chapter 645, 62 Stats. 826.

The prosecution was commenced by an Indictment which alleges in substance that the appellants and co-defendant Michael Victor Schlising devised, and intended to devise, a scheme and artifice to defraud and to obtain

money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made, and that the said individuals, for the purpose of executing the scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from Los Angeles, California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, D. F., Republic of Mexico [Tr. 3-6].

The jurisdiction of this Court was invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294, June 25, 1948, Chapter 646, 62 Stats. 929-930. Notice of appeal was filed on May 25, 1956 [Tr. 33-34].

Statement of the Case.

A. Indictment and Pertinent Evidence.

Appellants do not question the sufficiency of the evidence to support the Indictment, and therefore have set out the allegations of the Indictment as the opening two paragraphs of their Statement of Case. Appellants then state, "The scheme set out in the indictment took place in Mexico City, D. F." There is no support in the record before this Court for that statement. Finally, appellants add a brief outline of facts relative to the "signal and sound" referred to in the Indictment.

In order to present a complete and somewhat more detailed statement of the case than appears in the appellant's Brief, we will also set out the Indictment verbatim, followed by a more comprehensive outline of the evidence

relative to the "signal and sound" there alleged. The Indictment reads:

> "From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the defendant Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses running at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as 'confidence man' engaged in betting money on 'fixed' horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of moneys won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johansen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955;

that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of $101,500, consisting of $1,500 in cash and a check for $100,000; that as a result of the said bet the defendant Emil Wentz had won $203,000; that the defendant William Bering Jensen, as president of the said American Club, would pay $200,000 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen $100,000 in cash as evidence that the said check in the amount of $100,000 would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance $24,000 in cash to be displayed to the defendant William Bering Jensen in combination with $76,000 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said $24,000 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional $25,000; that the defendant Michael Victor Schlising had displayed $100,000 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional $200,000 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost $200,000 purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said $24,000 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

"On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William

> Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico."

The words "signal and sound" in the Indictment in fact describe a Western Union Telegraph Company telegram which originated in Los Angeles, California, and bore a Mexico, D. F., Mexico, address [Tr. 48-49, 61-62, Exs. 11, 12]. There are no physical facilities for sending messages by wire from Los Angeles to Mexico City directly across the California-Mexico border [Tr. 63, 65]. In the ordinary course of business, Western Union messages originating in Los Angeles and addressed to Mexico City are sent to Dallas, Texas, and from Dallas to San Antonio, Texas, on Western Union lines situated entirely within the continental limits of the United States and passing through California, Arizona, New Mexico and Texas. Such messages are then retransmitted from San Antonio to Mexico City [Tr. 48-50, 64, 70-71, 81].

A Los Angeles to Mexico City telegram is, in the usual course of business, punched on tape at Los Angeles; the tape is placed in a transmitter which sends electrical impulses to Dallas, resulting in reproduction of a similar or reperforated tape. The reperforated tape is in turn placed in another transmitter electrically connected with a Western Union office at San Antonio. In the latter city the message is printed on a gummed tape and that tape is

placed upon a blank, resulting in a reproduction of the message in form not unlike that of the conventional delivered telegram [Tr. 71-72, Ex. 12]. A Western Union employee then prepares a new perforated tape which is passed through another transmitter, causing reproduction of the message in Mexico City [Tr. 71, 73]. The message described in the Indictment was in fact handled in the customary manner described above [Tr. 48-52, 79-80, Exs. 11, 12].

B. Questions of Law.

I.

Is a telegram originating in the United States and transmitted to a point in a foreign country transmitted "by means of interstate wire" within the meaning of Title 18, United States Code, Section 1343, if it is actually and necessarily sent by wire across interstate boundaries to a point in another state where it is received, recorded and subsequently retransmitted to the foreign addressee?

II.

Do the courts of the United States lack jurisdiction over a defendant who alleges that he was seized and deported from a foreign nation by its agents who delivered him to officers of the United States at the point of deportation?

The foregoing questions of law were raised in the trial court in the manner stated at page 5 of the Brief of Appellants.

ARGUMENT.

I.

A Telegram Originating in the United States and Addressed to a Point in a Foreign Country Is Transmitted "by Means of Interstate Wire" Within the Meaning of Title 18, United States Code, Section 1343, if It Is Actually and Necessarily Sent by Wire Across Interstate Boundaries to a Point in Another State Where It Is Received, Recorded and Subsequently Retransmitted to the Foreign Addressee.

Title 18, United States Code, Section 1343, entitled "Fraud by Wire, Radio or Television," provides in pertinent part:

> "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted *by means of interstate wire* . . . any . . . . signals . . . or sounds for the purpose of executing such scheme or artifice shall be fined . . ." (Emphasis added.)

Although the telegram alleged and proven was actually and necessarily transmitted by means of a wire crossing interstate boundaries, appellants nevertheless contend that it was not sent "by means of interstate wire" because it was addressed to a point outside of the United States.

The initial vice in the argument of the appellants in support of that conclusion is that it rests upon the definitions of terms not pertinent to the crime charged in the Indictment. The words of the charging statute sig-

nificant to the questions are "by means of interstate wire." It is the use of the physical facility, the actual wire crossing state lines, for the purpose of executing the scheme or artifice, which is proscribed. Therefore, the definitions of "interstate communication" and "interstate transmission" at 47 U. S. C., Sec. 153(e) are not pertinent. However, if these words are, somehow, read into the statute, their definitions would, nevertheless, include the signal and sound alleged and proven. There was, in fact, a transmission from "(a) state . . . of the United States (California) . . . to . . . (an) other state . . . of the United States (Texas)." 47 U. S. C., Sec. 153(e)(1). The further transmission from Texas to a point in the Republic of Mexico can hardly vitiate the interstate character of the prior transmission from California to Texas.

Appellants' contention that the transmission can be "by means of interstate wire" only if the ultimate destination of the message is at a point in a state other than the state of origin is for a further reason inconsistent with the statutory definitions cited by them. In additional language not quoted in appellants' brief those definitions include (with limitations not here pertinent) transmissions originating in and intended for final delivery at points in the same state of the United States. Thus, 47 U. S. C., Sec. 153(e)(3) provides that the terms "interstate communication" or "interstate transmission" mean communication or transmission:

> "(3) between points within the United States but through a foreign country; but shall not, *with respect to the provisions of subchapter II of this chapter,* include wire or radio communication between points in the same State, Territory, or possession of the

> United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." (Emphasis added.)

Subchapter II, entitled "Common Carriers," does not contain the statute under which the indictment was brought.

The statutory definitions cited suggest that Congress intended that a broad interpretation be given to the terms in question. Although we do not, for the reasons noted above, believe that those terms are germane to the questions of law raised by the appeal, we submit that their use in the statute under consideration would compel the same conclusion as must be reached by giving a literal interpretation to the words "by means of interstate wire."

The term "interstate commerce" is more susceptible to the suggested limitation that points of origin and destination must be in different states of the Union than is the expression "by means of interstate wire." However, the cases defining the concept of interstate commerce reject such an arbitrary and unwarranted qualification. Thus, certain federal penal statutes proscribe the transportation of named objects in interstate commerce when such transportation is accompanied by a certain knowledge or intent, *e.g.*, the Dyer Act, 18 U. S. C., Sec. 2312, June 25, 1948, Chapter 645, 62 Stats. 806; and the Mann Act, 18 U. S. C., Sec. 2421, June 25, 1948, Chapter 645, 62 Stats. 812, amended May 24, 1949, Chapter 139, Section 47, 63 Stats. 96. It has been generally held that the gravamen of the offense charged in each of those statutes is the transportation of the forbidden object across a state line. Whether the points of beginning and ultimate destination are or are not in the same state is immaterial. Dyer Act:

Hughes v. United States, 4 F. 2d 387 (8 Cir., 1925); *United States v. Winkler,* 299 Fed. 832 (D. C. Tex., 1924). Mann Act: *Batsell v. United States,* 217 F. 2d 257 (8 Cir., 1954); *Mortensen v. United States,* 39 F. 2d 967 (8 Cir., 1943), reversed on other grounds, 322 U. S. 369; *contra, United States v. Wilson,* 266 Fed. 712 (D. Ct. Tex., 1920), criticized in *United States v. Winkler, supra,* and *Mortensen v. United States, supra.* Those decisions are inconsistent with appellants' "destination" theory.

Similarly, in civil cases involving the concept of interstate commerce, the federal courts have rejected the contention that there must be a transportation or transmission from a point in one state to a point in another state, and have characterized as interstate commerce transportation and transmissions between points in the same state, if they cross interstate boundaries. *Cornell Steamboat Co. v. United States,* 321 U. S. 634, 64 S. Ct. 768, 88 L. Ed. 978 (1944); *Missouri Pac. R. Co. v. Stroud,* 267 U. S. 404, 45 S. Ct. 243, 69 L. Ed. 683 (1924); *Western Union Telegraph Co. v. Speight,* 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104 (1920). The *Speight* case involved a telegraph message sent through a state other than the state of origin to a terminus within the state of origin. If the term "interstate commerce" includes transportation and transmissions crossing state lines without regard to whether the points of origin and destination are in different states, *a fortiori,* the term "by means of interstate wire" does not require that the message be ultimately destined for a point in a state other than the state of its origin, but only that the message in fact be transmitted by a wire connecting two or more states.

A further fallacy in the argument of the appellants is that it presupposes that the terms "interstate" and "foreign" are mutually exclusive. In fact, as is well illustrated by the circumstances of this case, a transmission may partake of both interstate and foreign character. Their misapprehension in this regard is illustrated by the decision in *Border Pipe Line Co. v. Federal Power Commission,* 171 F. 2d 149 (C. C. A., D. C., 1948), cited at page 13 of Brief of Appellants. In that case petitioner owned and operated a gas pipeline located wholly within the state of Texas. It sold its gas at its terminus near the Rio Grande River to an industrial consumer which transported the gas into Mexico. Although petitioner had secured the appropriate permits for export of gas, it was contesting an order of the Federal Power Commission which would regulate petitioner as a natural gas company engaged in interstate commerce. The court said, in part:

> ". . . Of course, if a company be in both interstate and foreign commerce, one might burden the other and so produce the result which the burden of intrastate on interstate commerce causes. But we do not have that situation here. The operation before us is wholly local, and it is only because of petitioner's sales for foreign commerce that the Commission seeks to control all its activities."

In the cited case there was no transportation of gas into or through a second state. The facts of the *Border Pipe Line* case would, therefore, be analogous to a communication by wire from Los Angeles, California, directly across the California-Mexico Border to Tijuana, Mexico. They are not, however, analogous to the case at bar where the allegations of the Indictment and the proof show a

transmission from Los Angeles, California, to Dallas, Texas, thence to San Antonio, Texas, all occurring prior to the further transmission to Mexico. Indeed, the language of the *Border Pipe Line Co.* case quoted above suggests that the court there would have reached the opposite result had the gas transported into Mexico been recovered in Oklahoma, shipped to a point in Texas, and thereafter transmitted to a point in the Republic of Mexico.

Powell v. United States, 112 F. 2d 764 (4 Cir., 1940), is also cited by the appellants, but appears to give scant support to their position. There appellants had been indicted for violation of the Elkins Act in that they had failed to observe published tariffs in connection with a shipment for export from Goldsboro, North Carolina, to Wilmington, North Carolina. The Government did not there argue that the shipment was not in foreign commerce, as is asserted by appellants at page 14 of their brief. On the contrary, the Government successfully argued that the shipment was in foreign commerce. The holding of the court was that the shipment was one in foreign commerce to which the interstate tariffs were applicable.

The quotation from *State of Texas v. Anderson, Clayton & Co.,* 92 F. 2d 104 (5 Cir., 1937), appearing at page 15 of the Brief of Appellants, is inaccurate. The correct quotation is, ". . . in determining whether a particular movement of freight is interstate *or intrastate* or foreign commerce, the intention existing at the time the movement starts governs. . . ." 92 F. 2d at 107. (Emphasis added.) As suggested by the words "or intrastate" omitted by appellants, the question in that case was whether certain shipments of cotton were intrastate on

the one hand, thus being subject to state regulation, or interstate and foreign on the other hand and not subject to the jurisdiction of the State Railroad Commission. That court was not concerned with distinctions between foreign and interstate commerce, and placed both in the same category for purposes of the questions to be decided by it.

Additional authorities cited by appellants at page 15 of their Brief appear to have no pertinence to the questions raised by this appeal, and in the interests of brevity will not be discussed here.

Appellants assert that the letter of March 30, 1956 from the Attorney General of the United States to the Speaker, House of Representatives (Appellants Br. pp. 10-12), recommending amendment of 18 United States Code, Section 1343, discloses "a fundamental weakness" in the Government's position. That contention was not made in the District Court; therefore the Government has had no opportunity to place upon the record of this case the additional facts of the matter alluded to by the Attorney General in order to show that the amendment was suggested by him to meet a situation essentially different from the case at bar. Under such circumstances, we believe it appropriate to represent to this Court the facts of the case which prompted the Attorney General's letter. We stand ready to support that statement by appropriate proof if so required.

The Attorney General's letter of March 30, 1956 in fact refers to allegations that a telephone call was made from a point in Mexico to Los Angeles, California, in the execution of a scheme to defraud. The call was transmitted by a wire which crossed the California-Mexico boundary and did not cross any interstate boundary.

Elsewhere in this brief appellee has urged that a communication may be solely interstate or solely foreign, or both interstate and foreign in character. The charging statute, as written at the time of the events of the case at bar, did not reach messages solely foreign in character because such messages were not sent "by means of interstate wire." An amendment appropriate to meet that omission was therefore proposed. Such an amendment cannot, however, cast any doubt upon the literal application of the statute in its original text to messages both interstate and foreign in character which are sent by "means of interstate wire."

Appellants assert that the District Court refused to define the terms "by interstate and foreign wire" which appear in the Indictment (Appellants' Br. p. 17). The exact language of the Indictment is "by *means* of interstate and foreign wire" [Tr. 6; emphasis added.] The statutory phrase "by means of interstate wire" (18 U. S. C., Sec. 1343) was defined in an instruction of the court set out elsewhere in Appellants' Brief as a specification of error [Tr. 91; Appellants' Br. p. 7]. The words "and foreign" were not defined. However, they are descriptive only, do not constitute a necessary part of the Indictment, and could have been wholly omitted without doing violence to the statement of the offense.

Furthermore, appellants did not offer an instruction containing a definition of transmission by means of foreign wire. Their proposed Instruction No. 2 [Tr. 92; Appellants' Br. p. 6] defines "foreign transmission" which is not the language of the Indictment or the statute. That Instruction was also objectionable because it misquoted the Indictment in its opening sentence, thus: "The Indictment refers to transmittal by interstate *or*

foreign wire." (Emphasis added.) Substitution of "or" for "and" is consistent with the appellants' theory that a transmission must be either fish or fowl, interstate or foreign. However, appellants can hardly complain of the court's refusal to rewrite the Indictment and the statute.

Appellants' proposed Instruction No. 4 and their objections to Government's proposed Instruction No. 10 [Tr. 91-93; Appellants' Br. p. 7] present the question defined at the opening of this portion of the Argument and discussed in detail above. Their proposed Instruction No. 5 [Tr. 93; Appellants' Br. p. 7] defines the terms not appearing in the statute or the Indictment, and is also framed under appellants' "fish or fowl" view of the nature of the telegram in question, which theory has been also treated above.

II.

The Courts of the United States Do Not Lack Jurisdiction Over a Defendant Who Alleges That He Was Seized and Deported From a Foreign Nation by Its Agents Who Delivered Him to Officers of the United States at the Point of Deportation.

Appellant Jensen moved to dismiss the Indictment on the ground that the Court had no jurisdiction over his person [Tr. 15-16]. The only showing made to support the motion was by way of affidavit alleging that he was seized and deported by Mexican authorities without "proceedings" or access to counsel [Tr. 17-18]. There was no allegation that any officer or agent of the United States had any connection with the acts of Mexican officials complained of, except that agents of the United States took him into custody at Laredo, Texas, the point of

deportation. Not only is there no allegation or proof of illegal act or impropriety on the part of any officer or agent of the United States, it is not even shown that the conduct of the Mexican officials described was in violation of the laws of the Republic of Mexico.

A much stronger showing would not have afforded to the appellant Jensen a defense to this action or a challenge to the jurisdiction of the Court. As was said in *Strand v. Schmittroth,* 233 F. 2d 598, 604 (9 Cir., 1956):

> "It has long been the rule in criminal prosecutions that if the accused is personally before a court having jurisdiction of the subject matter, that court has jurisdiction over the accused regardless of how the accused was brought into the presence of the court."

The footnote to the text last quoted contains a summary of the leading cases as follows:

> "Ker v. People of State of Illinois, 1886, 119 U. S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (kidnapped in Peru and brought before an Illinois court); Mahon v. Justice, 1888, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (seized by armed men in West Virginia and taken to Kentucky); Pettibone v. Nichols, 1906, 203 U. S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (kidnapped in Colorado and taken to Idaho for trial); Moyer v. Nichols (Haywood v. Nichols), 1906, 203 U. S. 221, 27 S. Ct. 121, 51 L. Ed. 160. Many state citations are listed in Pettibone v. Nichols, 203 U. S. at page 215, 27 S. Ct. 111. Additional federal cases are In re Johnson, 1897, 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103 (illegal arrest); Malone v. United States, 9 Cir., 1933, 67 F. 2d 339 (premature arrest); United States ex rel. Voight v. Toombs, 5 Cir., 1933, 67 F. 2d 744 (wrongful seizure beyond territorial jurisdiction of court); Cardigan v. Biddle, 8 Cir., 1925, 10 F. 2d 444 (fugitive from justice surrendered on

request of another state may be tried in demanding state for crimes other than the one for which he was surrendered)."

Although a petition for rehearing *en banc* was granted in the *Schmittroth* case on October 1, 1956, the issues presented on rehearing do not affect the discussion quoted above.

McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1942), cited by appellant Jensen, is obviously inapplicable to the question under consideration. In *McNabb* a conviction was reversed because based in part upon a confession taken during a period of unnecessary delay between arrest and arraignment. By contrast, in the case at bar there is no wrongful act of a federal agent alleged or proven. No evidence obtained by means of a wrongful act on the part of any person was offered or received.

In *United States v. Rosenberg,* 195 F. 2d 583 (2 Cir., 1952), cert. den. 344 U. S. 838, 73 S. Ct. 20, 97 L. Ed. 652, also cited by appellants, the Court refused to pass upon a similar contention because the defendant did not make timely motion under Rule 12(b) of the Federal Rules of Criminal Procedure.

The Motion in the instant case was filed and served on appellee on Friday, May 18, 1956 [Tr. 15-18; and see Proof of Service attached to Motion to Dismiss for Lack of Personal Jurisdiction over Defendants Michael Victor Schlising and William Bering Jensen in the Transcript of Record prepared by the Clerk of the United States District Court and heretofore docketed with this Court]. The Motion was heard on the next business day, Monday, May 21, 1956, which was also the first day of trial [Tr. 19-20]. There was no order shortening time for hearing

of the Motion. At the time of the arraignment and plea of the appellant Jensen, May 1, 1956, the Court ordered that motions to be made by all defendants be filed not later than May 9, 1956 [Tr. 7]. Failure of the appellant Jensen to comply with that order of the Court was also a failure to comply with the provisions of Rule 12(b), Federal Rules of Criminal Procedure, as follows:

> "(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.
>
> "(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."

Also lacking was the five-day notice of motion required by Rule 45(d). The delay in the filing and service of the Motion until the last business day preceding the day of trial made it manifestly impossible for the Government to meet the factual allegations of misconduct on the part of Mexican officials. Therefore the Government expressly refused to waive the defect in notice [Tr. 60]. The contention that the Court lacked personal jurisdiction over the person of the defendant Jensen was renewed by his

Motion in Arrest of Judgment [Tr. 29-30]. However, in *United States v. Rosenberg, supra,* the Court held that a defendant may waive an objection that he might otherwise have to jurisdiction over his person, that failure to make timely motion under Rule 12(b) would constitute such a waiver, and that the point could not be raised by motion in arrest of judgment.

For the foregoing reasons the Government submits that the appellant Jensen's Motion to Dismiss for Lack of Personal Jurisdiction was neither timely nor meritorious.

Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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